Supreme Court, U. S.
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IN THE

Supreme Court of the United States

DOCKET NO. 78-1429

ANTHONY COSTANZO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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SUPREME COURT OF THE UNITED STATES

DOCKET NO.

ANTHONY COSTANZO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

The Petitioner, Anthony Costanzo, respectfully prays that a writ of certiorari issue to review the judgment without opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding on February 14, 1979.

OPINION BELOW

The Orders of the Court of Appeals denying the appeal and denying rehearing *en banc* appear in the Appendix hereto and are not reported. The oral opinion of the District Court appears in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was entered on January 9, 1979. A timely petition for rehearing *en banc* was denied on February 14, 1979, and this petition for certiorari was filed within 30 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

(1) Whether the new trial standard of review in missing evidence cases should consider only prejudice to the ability to present a defense.

(2) Whether false testimony by a Federal Agent about an undercover operative's performance bearing upon his substantive intent requires that an indictment be dismissed or a new trial granted by authority of *United States v. Agurs*, 427 U.S. 97 (1976), regardless of other evidence of criminal conduct.

(3) Whether the Jencks Act, 18 U.S.C. §3500 requires a new trial whenever government agents fail to record for ultimate disclosure exculpatory information that they are under a duty by their agency to record, regardless of other evidence of criminal conduct.

(4) Whether *Giglio v. United States*, 405 U.S. 150 (1972) requires that an indictment be dismissed where probative evidence of immunity promises was destroyed by the government and the government failed to record performance of the promisee while under a duty to do so.

STATUTORY PROVISIONS INVOLVED:

United States Code, Title 18:
§3500

3500. Demands for production of statements and reports of witnesses.—(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of

such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate cosrt for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under paragraph (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term "statement," as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement.

STATEMENT OF THE CASE

Petitioner was a contractor facing financial problems in connection with a large project. While seeking extra financing, he acquired both a business associate, Kelly, and at about the same time, exposure to federal tax prosecution. Kelly offered to supply sources of alternative financing. Shortly thereafter, Petitioner was initially recruited solely as an F.B.I. informant under mounting I.R.S. pressure. Ultimately, one of his functions was to report on Kelly. Kelly evidently had the same assignment with regard to Petitioner because he turned up as a principal witness at Petitioner's trial. Prior to the government refund check incident that formed the basis of indictment, the government escalated Petitioner's required cooperation to undercover operative-potential witness status. At the same time, six months had elapsed and no action had been taken on Petitioner's tax problems. During the same period, Petitioner's erstwhile business associate, Kelly, who knew that Petitioner was an informant, promised imminent sources of construction money that never seemed to materialize. A crisis of confidence developed. Petitioner pressed the government for assurances of immunity. On one occasion he recorded the conversation, but the government discovered the taping and destroyed it.

Finally, Petitioner became involved with the government refund check transaction which he alleged was part of his assignment to investigate Kelly. During this period, Petitioner had one taped conversation with his F.B.I. "handler" about Kelly which escaped government notice and was misplaced by the Public Defender. Ultimately it surfaced on the new trial motion leading the F.B.I. special agent to concede that his trial testimony was not true and exposing the relevant F.B.I. report, required by the F.B.I. to be made by the agent, disclosed pursuant to the Jencks

Act, as not disclosing the material revealed by the tape. At the trial, Petitioner claimed that other disclosed F.B.I. reports did not fully nor accurately describe his cooperation.

Upon his conviction of conspiracy and possessing stolen refund checks, Petitioner belatedly discovered his missing tape. This supported the new trial motion which was denied by the trial court on the basis that there was overwhelming "other evidence" of criminal conduct. The conviction was affirmed without opinion and rehearing *en banc* was denied by the Third Circuit. This Petition For Writ of Certiorari followed.

REASONS FOR GRANTING THE WRIT

I. The decisions below clearly conflict with decisions of the Fifth Circuit applying this Court's holding in *United States v. Agurs*, 427 U.S. 97, 113 (1976) and the Fifth Circuit view that the judicial branch is required to exert affirmative action to enforce the Jencks Act, 18 U.S.C. §3500. The decisions below also clearly conflict with the Ninth Circuit applying this Court's holding in *Giglio v. United States*, 405 U.S. 150 (1972). The factual circumstances clearly call for exercise of this Court's supervisory responsibility to maintain integrity of the fact-finding process when the government claims that its undercover operatives have not performed and seeks to prosecute upon transactions that occurred during the course of the relationship.

A. *The Third Circuit Standard*

The District Court applied the literal words of *Agurs* and held that the false information could not have, in any reasonable likelihood, affected the jury verdict in view of overwhelming other evidence. R.1293a-1294a. The Third Circuit affirmed without opinion and denied *en banc* reconsideration. Remedy never was discussed.

It is submitted that the District Court, and also the Third Circuit, by affirmance of the reasoning, adopted an unjustified construction of the line of cases discussed in *Agurs*. On certiorari, the Petitioner would argue that perjured testimony is an assault upon the independence of the judiciary, an attempt to overwhelm its processes much as by the use of coerced confessions. Integrity of the guilt-determining process itself requires a more sensitive threshold of prejudice; the likelihood of future infractions is greater because the government must resort

to the courts to advance its interests. Consequently, the courts below erred seriously in considering the impact of one piece of evidence where there was undercover activity. The real impact of the false evidence disclosure was to demonstrate the unreliability of the disclosed F.B.I. memoranda. Had the memoranda been accurate, Petitioner claims they would have been affirmative evidence of Petitioner's relationship with the government as would the tape recording destroyed by the government. As will appear later, the court should have weighed impact upon the defense case rather than impact on the government's case.

B. *The Ninth Circuit*

In *United States v. Butler*, 567 F.2d 885 (9th Cir. 1978), defendants in a California criminal trial found substantial post-conviction evidence of government promises of leniency to the witness. The district court held that the evidence would not have altered the jury verdict and denied the new trial motion, considering other evidence of criminality as did the District Court and Third Circuit in Petitioner's case.

On appeal, the Court of Appeals for the Ninth Circuit reversed and granted a retrial holding that the government was obliged to disclose both substantive evidence and credibility evidence involving key government witnesses. Vicarious responsibility was laid upon prosecuting officials for the acts of subordinate government employees by authority of *Giglio v. United States*, 405 U.S. 150, 154 (1972). Because the trial judge found that the new evidence would not have altered the overall jury verdict, the Ninth Circuit felt necessary to reject that test in specific language:

> "even if the court's findings were found only to establish negligent or unintentional instead of wilful non-disclosure of the prosecutions dealings with Durden. . . ." 567 F.2d at 889.

The Ninth Circuit quoted the *Giglio* standard as: "any reasonable likelihood have affected the judgment of the jury." See, *Giglio, supra*, 405 U.S. at 154. The Ninth Circuit *Giglio* test and language, but not application, are identical to the test employed by the District Court in Petitioner's case. Additionally, the District Court in Petitioner's case also found that the Special Agent's testimony was negligent or a memory lapse. Thus, the Ninth Circuit adopted a test that is directly equal in formula but directly opposite to the application in Petitioner's case. The explanation for the difference is that the Ninth Circuit examined the narrow issue of prejudice to the defense ability to attack the key government witness, Durden, not the issue whether the evidence would affect the government's case.

Giglio was cited to the Third Circuit four times and *Butler* was cited three times in the main appeal brief; *Giglio's* parent case, *Napue v. Illinois*, 360 U.S. 264 (1959) was cited once as was *Butler* and *Napue* in the petition for rehearing *en banc*. The Third Circuit was well aware of the Ninth Circuit position and the law of this Court, but the judgment is in conflict with both.

C. *The Fifth Circuit*

In *Beasley v. United States*, 425 U.S. 956 (1976) this Court granted certiorari and remanded an evidence suppression case at the suggestion of the Solicitor General who felt that the non-disclosed key-witness statement might involve a Jencks Act violation. Upon remand, the United States Court of Appeals for the Fifth Circuit remanded to the District Court, *United States v. Beasley*, 535 F.2d 293 (5th Cir. 1976). The trial court held a lengthy evi-

dentiary hearing, concluding that the government's good faith failure to produce a pre-trial statement by a key prosecution witness did not violate the Jencks Act nor unduly restrict cross-examination. Upon appeal, the Court of Appeals reversed. *United States v. Beasley*, 576 F.2d 626 (5th Cir. 1978).

The parallel to the Ninth Circuit is that the Fifth Circuit has construed the statutory policy of Congress, expressed in the Jencks Act, to be identical in purpose and application to that of *Giglio*. This interpretation of the Jencks Act is supported by the position taken by the Solicitor General in this Court in *Beasley*.

Taken together, the Fifth and Ninth Circuits, and the Solicitor General, have discerned in the Jencks Act and in *Giglio* a common law approach by Congress and this Court making the Executive Branch accountable in the outcome of its criminal cases for non-compliance with Congressional and inter-executive procedures that preserve exculpatory evidence for the benefit of a defense presentation. Prejudice is defined as harm to the defense case, not harm to the prosecution case.

While the District Court proceedings in Petitioner's case contained a Jencks Act order, neither the new trial motion nor the appeal were premised upon the Jencks Act. The Petitioner urges that this circumstance should not foreclose review by this Court for the following reasons: First, Fifth Circuit construction of the Jencks Act imposes an affirmative duty upon the District Court. This is the equivalent of noticing plain error. Second, although the Third Circuit faced vigorous assertion of the parallel *Giglio* principles which were pursued even to a request for *en banc* reconsideration, the Court was not persuaded. There is no reason to believe that the Jencks Act argument would have been more persuasive.

Finally, the Third Circuit affirmed without opinion and denied a specific request for an opinion. As a result, this Court will be deprived of Third Circuit views even as to the arguments advanced in that court.

This case highlights a particularly difficult problem area for the judicial system. Evidence concerning the performance and thus the intent of an undercover operative is peculiarly conclusive on the issue of criminality but always under the control of the government. Like a confession, it is subject to government manipulation.

D. *Facts and Legal Issues Inviting Review*

Factually, this case is particularly suited for exercise of this Court's supervisory responsibility. First, there was a Jencks Act order prior to trial. Second, an F.B.I. Special Agent admitted obliterating a tape made by the Petitioner that was claimed by the defense to have probative worth. Third, the same F.B.I. Special Agent filed an affidavit recanting some of his trial testimony in response to new-trial motion evidence from a missing tape later obtained by Petitioner. Fourth, the F.B.I. investigative memoranda produced at trial while required to contain, did not in fact contain the information that was revealed by the new-trial motion tape, thus calling into question the completeness and accuracy of the remaining memoranda which Petitioner had challenged at trial as being not complete nor accurately setting forth the exculpatory material that would have made the memoranda evidence for the defense.

Legally, this case squarely focuses attention on the applicable standard of review because the undercover witness whose conduct happened to be crucial was the Petitioner, himself. The missing evidence is most particularly a true government account of Petitioner's own conduct.

As will appear below, this case presents the obvious question whether there is a difference between prejudice to rebutting the government's case and prejudice to presenting a defense case. The answer dictates the scope of review and remedy that this Court must announce for discovery/false evidence violations in cases of this type.

Petitioner's entire defense was confession and avoidance. Because the conspiracy alleged is an intent crime, *United States v. Feola*, 420 U.S. 671, 686 (1975), as is the substantive mail theft charge, *Barnes v. United States*, 412 U.S. 837, 847 (1973), this Court's attention is squarely focused upon the applicable standard of review. The Petitioner will argue that the generalized prejudice review applied by the District Court misread the Constitutional, *Agurs*, test. Because undercover activities must produce conduct consistent with criminal behavior or be useless and possibly suicidal, consideration of prejudice as subtraction from the prosecution case is a tautology and thus illustrative of the true need for clarification by this Court. The Petitioner is not attacking most of the government's case, so prejudice to his ability to subtract from it is a straw man revealed in the garb of weighing the "overwhelming" other evidence in a test for prejudice. Confession and avoidance is an affirmative defense that exists best in the presence of convincing prosecution evidence. In Petitioner's case it operates by substituting an alternative *mens rea* for culpable intent. Once this obvious proposition is recognized, the only test for prejudice is the extent to which a defendant is deprived of information that will enable him to raise the single-issue alternative as a direct belief or an inference for the jury. Consequently, this Court should hold that prejudice results whenever that opportunity is curtailed or denied by government action. The foregoing formulation produces the identical application of the *Butler* test although it is

better articulated. *Butler* clearly recognizes the mischief, and its approach should be adopted by this Court with the clarification set forth above.

Similarly, using the same verbal formula, the Fifth Circuit applies the same logic to interpretation of Jencks Act commands. Again, because Petitioner's case is so classic a defense model, it equally serves as an ideal vehicle for this Court to harmonize the Fifth Circuit result with an articulation identical to that suggested for the Ninth Circuit holding.

Because the undercover relationship is indispensable to organized crime investigations, this Court should give attention to the manner in which the judicial system must encourage above-board government conduct in handling operatives and a fair trial to protect their interests. The relationship cannot be beyond effective judicial review where the judicial system is used against them. The alternative would be to allow persons volunteering or drawn into the system to virtually lose their citizenship and become the creatures of the government while encouraging corruption and self-dealing with operatives by the agents assigned to dominate them. The subtractive standard of review used by the District Court and affirmed by the Third Circuit relegates hapless undercover operatives to the illusory remedy of a show trial when their affirmative defense evidence is discovered to be solely and unreliably in the hands of their captors.

Petitioner seeks a remedy that will enhance reliability of the guilt-determining process by making probative evidence more complete and accessible to the finder of fact.

This Court should grant review and define the test of prejudice as an examination of Petitioner's opportunity to conduct his defense that only lawful intent existed, and this Court should reverse the judgment of the court below.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment of the Third Circuit.

Respectfully submitted,

KENDALL AND KESSLER
Attorneys for Petitioner
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Union, New Jersey 07083
(201) 687-7310

By /s/ Elson P. Kendall
ELSON P. KENDALL

APPENDIX

INDICTMENT
(Filed October 14, 1977)

The Grand Jury, in and for the District of New Jersey, sitting at Newark, charges that.

COUNT ONE

From on or about April 15, 1976, to on or about May 3, 1976, the exact dates being unknown to the Grand Jury, in the District of New Jersey and elsewhere, the defendants,

ANTHONY J. COSTANZO,
ROBERT STASIO,

did knowingly, wilfully and unlawfully combine, conspire, confederate and agree with each other and with other persons being unknown to the Grand Jury, to commit an offense against the United States in violation of Title 18, United States Code, Section 1708, in that the defendants combined, conspired, confederated and agreed to receive, conceal and unlawfully have in their possession nine (9) United States Treasury Tax Refund checks having a total value of $3,018.48 which had been stolen, taken and embezzled from and out of the mail, a post office or station thereof, knowing the said checks to have been stolen, unlawfully taken and embezzled.

OVERT ACTS

In furtherance of the conspiracy and to effect the objects thereof, the defendants committed and caused to be committed the following overt acts, among others:

1. On or about April 30, 1976, in New York, New York, the defendants Anthony Costanzo and Robert Stasio met with Patrick Kelley.

2. On or about April 30, 1976, in Elizabeth, New Jersey the defendant Anthony Costanzo met with Federal Bureau of Investigation Special Agent Leonard M. Pedreira, who was then and during all times relevant to this Indictment acting in an undercover capacity.

3. On or about May 3, 1976, in Elizabeth, New Jersey the defendant Anthony Costanzo met with Special Agent Pedreira and provided Special Agent Pedreira with the following United States Treasury Refund checks in exchange for $1,500.00 in cash, that being approximately fifty percent of the total value of said checks:

1. United States Treasury Check No. 61,766,548
2. United States Treasury Check No. 61,583,828
3. United States Treasury Check No. 61,767,305
4. United States Treasury Check No. 61,766,873
5. United States Treasury Check No. 61,767,551
6. United States Treasury Check No. 61,767,588
7. United States Treasury Check No. 61,583,824
8. United States Treasury Check No. 61,767,365
9. United States Treasury Check No. 61,767,365

All of the foregoing in violation of Title 18, United States Code, Section 371.

COUNT TWO

From on or about April 15, 1976, to on or about May 3, 1976, at Elizabeth, in the District of New Jersey, and elsewhere, the defendants,

ANTHONY J. COSTANZO,
ROBERT STASIO,

did receive, conceal and have in their possession nine (9) United States Treasury Tax Refund checks, described in

Count One above, having a total value of $3,018.48, which had been stolen, unlawfully taken and embezzled from the mail, a post office or station thereof, knowing the said checks to have been stolen, unlawfully taken and embezzled.

In violation of Title 18, United States Code, Sections 1708 and 2.

A TRUE BILL:

/s/ Ted W. Martens
TED W. MARTENS
Foreman

/s/ Jonathan L. Goldstein
JONATHAN L. GOLDSTEIN
United States Attorney

/s/ William W. Robertson
WILLIAM W. ROBERTSON
Attorney in Charge
Newark Strike Force

ORDER FOR DISCOVERY AND INSPECTION
(Filed October 21, 1977)

In order to eliminate unnecessary motions for discovery in this case, to eliminate delays in the presentation of evidence and the examination of witnesses, and to expedite the trial pursuant to the provisions of the Speedy Trial Act of 1974,

IT IS ORDERED:

1. *Conference.* Within ten (10) days from the date hereof, the United States Attorney or one of his assistants and the defendant's attorney shall meet and confer, and the government shall:

(a) Permit defendant's attorney to inspect and copy or photograph any relevant written or recorded statements or confessions made by the defendant, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or may become known, to the attorney for the government;

(b) Permit defendant's attorney to inspect and copy or photograph any relevant results or reports of physical or mental examinations, and of scientific tests or experiments made in connection with the case, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or may become known to the attorney for the government;

(c) Permit defendant's attorney to inspect and copy or photograph any recorded testimony of the defendant before a grand jury;

(d) Permit defendant's attorney to inspect and copy or photograph books, papers, documents, tangible objects, buildings or places which are the property of the defendant and which are within the possession, custody or control of the government;

(e) Permit defendant's attorney to inspect and copy or photograph the defendant's prior criminal record in the possession of the attorney for the government;

(f) Permit defendant's attorney to inspect, copy or photograph any exculpatory evidence within the purview of *Brady v. Maryland.*

(g) If there is more than one defendant named in the indictment, and if the government intends to introduce into evidence in this case in chief a confession made to law enforcement authorities by one defendant which names or makes mention of a co-defendant, then the government must make a copy of that statement or confession available to counsel for the non-declarant defendant, along with a proposal for its redaction to conform with the requirements of *Bruton v. United States.* If the government makes no such disclosure and turnover within the time period allowed, the confession may not be received at a joint trial of the declarant and non-declarant defendants. If, within ten (10) days after receipt of the confession and its redacted version, counsel for the non-declarant defendant makes no objection to the receipt of the redacted statement into evidence.

2. *Disclosure Declined.* If, in the judgment of the United States Attorney, it would be detrimental to the interests of justice to make any disclosures set forth in paragraph 1, disclosure may be declined, and defense counsel advised in writing of the declination within five (5) days of the Conference.

If the defendant seeks to challenge the declination he may move the court for relief in the following manner:

(a) No later than five (5) court days from the time that the government declines, the defendant shall file a motion for discovery or inspection.

(b) The motion shall notice a hearing on the next appropriate motion day pursuant to the provisions of General Rule 12 of the General Rules of this court.

(c) The motion shall set forth (1) the statement that the prescribed conference was held; (2) the date of the conference; (3) the name of the Assistant United States Attorney with whom the conference was held; (4) the matters which were agreed upon; and (5) the matters which are in dispute and which require the determination of the court.

3. *Continuing Duty.* Any duty of disclosure and discovery set forth herein is a continuing one and the United States Attorney shall produce any additional information gained by the government.

4. *Exhibits.* The government shall pre-mark all exhibits which it intends to introduce as part of its direct case and shall permit defendant's attorney to inspect and copy these exhibits 30 days prior to the commencement of trial. A set of such pre-marked exhibits with an exhibit list should be turned over to the deputy clerk before or at the outset of trial. The defendant's exhibits shall also be pre-marked but need not be disclosed until actually used at trial. The government shall also pre-mark all Jencks Act materials so that no trial delay is encountered while they are marked at the time of turning over to defendant's counsel.

5. *Authenticity of Exhibits.* The authenticity of all exhibits examined by defense counsel pursuant to the provisions of paragraph 4 of this Order will be deemed to have been accepted by the defendant unless defense counsel files with the court 14 days prior to the date of

trial, a notice that the authenticity of the exhibits will be contested by the defendant at trial, together with a statement delineating why the authenticity of the exhibit is being challenged together with a certification that the challenge to authenticity is being made in good faith.

6. *Chain of Possession.* When defense counsel has examined an exhibit pursuant to the provisions of paragraph 4 of this Order, the chain of possession of the exhibit will be deemed to have been accepted by the defendant unless defense counsel filed with the court 14 days prior to the date of trial, a notice that the chain of possession of the exhibit will be contested by the defendant at trial together with a statement delineating that the authenticity of the exhibit is being challenged and a certification that the challenge to authenticity is being made in good faith.

7. *Scientific Analysis.* When the government has disclosed to defense counsel at the conference set forth in paragraph 1, the scientific analysis of an exhibit proposed to be introduced at the trial by the government, which analysis has been determined by an expert in the field of science involved, then the scientific analysis of the exhibit will be deemed admitted unless defense counsel filed with the court prior to fourteen (14) days of the trial a notice that the scientific analysis of the exhibit will be contested.

/s/ H. Curtis Meanor
United States District Judge

DATED: October 21, 1977

TRANSCRIPT AT PROCEEDING
Dated April 10, 1978

EXCERPT

(48) It still doesn't excuse, I think, the fact that some record can be made of these requests of Costanzo even though he had the motivation I described, so we wouldn't find ourselves with this kind of a post trial motion and this kind of complication.

Now, the most liberal standard I know with regard to the use of perjured testimony is contained in United States against Augers, 427 U.S. 97. With respect to the use of perjured testimony in the Brady contention, the U.S. Supreme Court has said that the undisclosed information will lead to a new trial, that is it will be material, if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.

Well, I don't think that's an appropriate standard here. I don't think we are dealing with known false statements by either Jumonville or the prosecution. I have nothing before me that would state that Jumonville or anything else would have a lapse, an understandable lapse of memory. Even if he did I don't think there's enough reasonable likelihood this case would have come out the other way. Even if Mr. Jumonville had admitted on cross examination, yes, I lied when I said I never asked Costanzo to get information on Patrick Kelly, I did in fact ask him to get information on Patrick Kelly vis-a-vis the New York bank and Heritage Iron Bank, I still don't think there would be any different result (49) in this case. I think the guilt, in short, of Mr. Costanzo in this case by virtue of an admission on his tape and some portions of his own testimony, was so overwhelming that no production of this tape or no admissions by Jumonville with regard to it would have altered the result.

As I say, I don't think this last standard of materiality I've had applied is a proper one, even if it is it won't help.

Mr. Seffern what is your schedule? I can't sentence your client today but I will in the next few days.

How about Friday the 14th, 9:00 o'clock in the morning? You bring an order in too, Mr. Polak, on this motion on Friday or earlier if you can get around to it.

MR. POLAK: Is there any reason why we can't go to next week, your Honor?

THE COURT: No.

MR. SEFFERN: Can we go over to—must it be on Friday, by the way?

THE COURT: No. I'll have to do it some morning. I'll do it the following week in the morning. You want to come over some afternoon at 4:00 o'clock I'll do it. If you want to wait around today I'll sentence this afternoon.

MR. SEFFERN: How about Friday the 21st?

THE COURT: Thats a little long.

MOTION DATED FEB. 2, 1979

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

FEBRUARY 2, 1979 No. 78-1532

UNITED STATES OF AMERICA

vs.

COSTANZO, ANTHONY J.,

Appellant.

(D.C. Crim. No. 77-00383-01)

Present: SEITZ, *Chief Judge*, GARTH and HIGGINBOTHAM, *Circuit Judges*

1. Motion by appellant for reconsideration by the panel of their decision to proceed by judgment order and issue, instead, a formal opinion, *with* brief in support,

in the above-entitled case. The judgment order was filed on January 9, 1979.

Respectfully,

/s/ T. F. Quinn
Clerk

ags/enc.

P.S.—If any answer, due by February 9, 1979, is received it will be forwarded immediately to the panel.

The foregoing Motion is denied.

BY THE COURT,

/s/ Seitz
Chief Judge

DATED: February 14, 1979.

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge*, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS, GARTH, and HIGGINBOTHAM, *Circuit Judges.*

The petition for rehearing filed by

Appellant

in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT,

/s/ Seitz
Chief Judge

DATED: February 14, 1979.

JUDGMENT ORDER

After considering the contentions raised by the appellant, to-wit, that (1) the appellant was denied effective assistance of counsel when the trial court ruled that counsel was bound by prior counsels acquiesence in the authenticity and accuracy of evidence when prior counsel acted under a conflict of interest; (2) the trial court erred in failing to grant a new trial based on the newly discovered evidence; (3) the trial court erred in failing to dismiss the indictment on the basis that the prosecution had utilized perjured testimony during the course of the appellant's trial; (4) the trial court erred in failing to grant a new trial on the basis that false evidence material to the issues was presented by the prosecutor; (5) the trial court erred in failing to grant a new trial or dismissal of the indictment on the ground that the presentation of false evidence and the negligent suppression of exculpatory evidence denied appellant due process of law; (6) the trial court manifestly abused its discretion in its admission of other crime evidence; (7) the appellant's acquittal on a charge which was used as other crime evidence in the instant case requires a reversal of the instant case; (8) the court's failure to instruct the jury as to the legal consequences of Kelly's status as informant/cooperating witness rendered the court's charge manifestly deficient; and (9) the trial court erred in failing to dismiss the indictment at the conclusion of the post trial hearing on the ground that due process had been violated, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

BY THE COURT,

/s/ Seitz
Chief Judge

Attest:
/s/ Thomas F. Quinn
THOMAS F. QUINN
Clerk

DATED: January 9, 1979.

Certified as a true copy and issued in lieu of a formal mandate on February 22, 1979.

Test:
/s/ Thomas F. Quinn
Clerk, United States Court
of Appeals for the Third Circuit

Supreme Court, U. S.
FILED
APR 28 1979
MICHAEL RODAK, JR., CLERK

No. 78-1429

In the Supreme Court of the United States

OCTOBER TERM, 1978

ANTHONY COSTANZO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

ANDREW S. GORDON
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Washington, D.C. 20530

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OPINION BELOW

The judgment order of the court of appeals (Pet. App. 12a-13a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on January 9, 1979. A petition for rehearing was denied on February 14, 1979 (Pet. App. 11a). The petition for a writ of certiorari was filed on March 16, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the district court erred in denying petitioner's motion for a new trial based upon the ground of allegedly newly discovered evidence.

STATEMENT

Following a jury trial in the United States District Court for the District of New Jersey, petitioner was convicted of conspiracy to possess stolen United States Treasury checks, knowing them to have been stolen from the mails, in violation of 18 U.S.C. 371 (Count I), and possession of the stolen checks, in violation of 18 U.S.C. 1708 (Count II). He was sentenced to two and a half years' imprisonment and a fine of $7,500 on Count I. Imposition of sentence was suspended on Count II and petitioner was placed on five years' probation. Following his convictions, petitioner moved for a new trial based on allegedly newly discovered evidence. After a hearing, the district court denied the motion (Pet. App. 8a-9a). The court of appeals affirmed by judgment order (Pet. App. 12a-13a).

1. The evidence at trial showed that sometime between April 15 and April 29, 1976, petitioner and Robert Stasio[1] met with Patrick Kelly, a government informant, for the purpose of soliciting Kelly's assistance in finding a buyer for United States Treasury checks that had been stolen from the mails (A. 154-155). Kelly was reluctant to handle the checks, so petitioner said that he and Stasio would try to sell the checks on their own (A. 155).

Petitioner was unable to find a buyer for the checks and, on April 30, he again met with Kelly. Following instructions given him by FBI agents, Kelly told petitioner that a possible buyer was Lenny Perrone, who worked at Mid-Atlantic Air-Sea Transport in Elizabeth, New Jersey (A. 158, 261). In fact, Mid-Atlantic was a sham trucking company operated jointly

[1]Stasio pleaded guilty to a related charged (A. 437-439). "A." refers to petitioner's appendix in the court of appeals.

by the FBI and the New Jersey State Police for the purpose of purchasing stolen property, and Perrone was an FBI agent, Leonard Pedreira (A. 43, 44).

That afternoon petitioner met Agent Pedreira at Mid-Atlantic and, in a conversation recorded by the agent, asked whether Pedreira would buy $3,000 worth of stolen Treasury checks for $1,500 (A. 58-63). In addition to showing Agent Pedreira the stolen Treasury checks, petitioner outlined his prior involvement with other stolen checks and credit cards. The agent asked petitioner to contact him again in a few days (A. 60-72).

Petitioner returned to Mid-Atlantic on May 3. Agent Pedreira then agreed to buy the checks and gave petitioner $1,500 in marked $50 bills (A. 99). The next day petitioner gave Kelly five of the $50 bills as payment for Kelly's efforts in procuring a buyer (A. 195, 255-256, 310).

2. Petitioner presented two defenses. First, he asserted that he was under the impression that the envelope he carried to Mid-Atlantic on April 30 contained a mortgage rather than stolen checks (A. 529). Petitioner explained that when he opened the envelope and discovered the checks he went through with the negotiations in order to gather information about Kelly's illegal activities, which he intended to report to the government (A. 539). In the alternative, petitioner argued to the jury that the government, through Kelly, entrapped him in retaliation for his failure as an informant.

The government's rebuttal evidence revealed that in March 1975 petitioner was indicted for failure to file a corporate tax return and was told that his personal tax returns were also under investigation. Hoping to obtain leniency on the tax charges, petitioner began providing information to FBI Agent Placide Jumonville and an Assistant United States Attorney concerning corruption in the banking industry (A. 859-861).

By the early spring of 1976, petitioner's cooperation had lessened. He refused to supply the government with documents and names necessary to prove his allegations that bank officials were accepting kickbacks in return for loans, he secretly recorded his meetings with government agents, and he engaged in illegal conduct without informing the government (A. 417, 863-867, 906, 922). Moreover, Agent Jumonville testified that he had not asked petitioner to supply information on Kelly and that on only one occasion had petitioner actually supplied information on Kelly (A. 269-270, 398-399).

3. After the jury had returned verdicts of guilty on both counts but before sentencing, petitioner moved for a new trial based on newly discovered evidence. The allegedly new evidence was a tape recording of a meeting between petitioner and Agent Jumonville on April 5, 1976. The tape recording was not presented at trial because, according to an affidavit supporting the new trial motion, petitioner had given the tape to the Federal Public Defender's office prior to trial but it could not be located until after the trial had been completed (A. 1150-1151).

Petitioner alleged that the tape showed that Agent Jumonville had given false testimony at trial when he testified that he had never asked petitioner to obtain information on Kelly. In the monitored conversation, petitioner does tell Agent Jumonville about Kelly's legal problems with regard to the Heritage Iron Bank in Morristown, New Jersey (A. 1168-1169). In addition, the agent is heard asking petitioner to find out more information regarding Kelly's relationship with a loan officer of a New York bank (A. 1185-1186).

After having his memory refreshed by the tape recording, Agent Jumonville filed an answering affidavit (A. 1239-1245). In general, the agent stated that he had not remembered this conversation because

the information petitioner had provided was not significant and because petitioner had never furnished any additional information regarding Kelly's involvement with the Heritage Iron Bank.[2] Furthermore, Agent Jumonville did not recall asking petitioner for additional information on Kelly because petitioner never supplied verification of the sketchy allegations that Kelly was paying off a loan officer at the New York bank (A. 1243).

The district court found that Agent Jumonville had suffered an understandable lapse of memory. It denied the motion for a new trial on the ground that petitioner's guilt "was so overwhelming that no production of this tape or no admissions by Jumonville with regard to it would have altered" the jury's verdict (Pet. App. 8a).

ARGUMENT

Petitioner contends (Pet. 7-14) that the district court erred in denying his new trial motion on the ground that the newly discovered evidence would not have affected the jury's verdict. This factual determination was affirmed by the court of appeals and does not warrant further review.

In his affidavit, Agent Jumonville admitted that his testimony at trial that he had not asked petitioner to obtain information on Kelly was incorrect. He stated, however, that he had forgotten the conversation because he deemed it insignificant. The district court credited this explanation and expressly found that the agent had not committed perjury (Pet. App. 8a). Accordingly, this case does not involve government misconduct in the knowing use of perjured testimony (compare *Napue* v. *Illinois*, 360 U.S. 264 (1959)) but

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[2]Agent Jumonville testified at trial that petitioner "may have" provided some information with respect to Kelly's relationship with the Heritage Iron Bank (A. 415).

rather concerns solely the post-trial recantation of testimony by a prosecution witness.

Generally, when a witness admits having given false testimony a new trial will be granted only if the court is reasonably well satisfied that (1) the witness was material and his testimony was false; (2) the jury might have reached a different conclusion were it not for the false testimony; and (3) the defense was surprised and unable to meet the false testimony or did not know of its falsity until after trial. *United States* v. *Wallace*, 528 F. 2d 863, 866 (4th Cir. 1976). See, *e.g.*, *United States* v. *Mackin*, 561 F. 2d 958, 961-962 (D.C. Cir.), cert. denied, 434 U.S. 959 (1977); *United States* v. *Coleman*, 460 F. 2d 1038, 1040 (8th Cir.), cert. denied, 409 U.S. 871 (1972). Admittedly, Agent Jumonville's trial testimony was inaccurate, but the district court found that the false testimony in no way affected the jury's verdict (A. 1290-1291, 1293-1294) and petitioner does not challenge that conclusion (Pet. 12). Petitioner, of course, was a participant in the conversation with Agent Jumonville, and he therefore could not have been unaware of the inaccurary of the agent's testimony during trial.[3] Nonetheless, petitioner never informed the court about the missing tape, nor did he seek a continuance to permit him to obtain the tape.

Petitioner argues, however, that the government's failure to disclose Agent Jumonville's request for information on Kelly requires that he be granted a new trial under either the Jencks Act (18 U.S.C. 3500) or this Court's decisions in *United States* v. *Agurs*, 427 U.S. 97 (1976), and *Giglio* v. *United States*, 405 U.S. 150 (1972). The Jencks Act is inapplicable since there was no written or recorded statement in the possession

[3]Petitioner's affidavits submitted in support of his new trial motion do not allege that he had forgotten the April 5 conversation prior to or during trial (A. 1152-1153).

of the government. By petitioner's own admission, he secretly recorded his conversation with the agent and gave the tape recording to the public defender. The Jencks Act does not require the government to memorialize the results of its interviews with informants.

Petitioner's reliance on *Agurs* and *Giglio* is similarly misplaced. He apparently contends that Agent Jumonville knew (although he temporarily forgot) about his conversation with petitioner regarding Kelly, that the agent's knowledge is attributable to the government, and that the prosecutor therefore violated his duty to disclose exculpatory evidence. But *Agurs* and *Giglio* are refinements of the rule of *Brady* v. *Maryland*, 373 U.S. 83 (1963), and, as the Court noted in *Agurs*, the *Brady* rule applies only to "the discovery, after trial, of information which had been known to the prosecution *but unknown to the defense*." 427 U.S. at 103 (emphasis supplied). As noted above, petitioner was obviously aware of the substance of his conversation with Agent Jumonville, so that, even assuming that the agent's prior knowledge of that event could be attributed to the government, the prosecutor's failure to disclose it during trial did not deprive petitioner of due process. See *United States* v. *Brown*, 582 F. 2d 197, 200 (2d Cir. 1978), cert. denied, No. 78-5352 (Oct. 16, 1978). Accordingly, there is no reason for the Court to consider petitioner's claim that the district court's application of the *Agurs* materiality requirement conflicts with decisions in other circuits.[4]

[4]Both in his statement of the questions presented for review (Pet. 2) and at one point in his argument (Pet. 11), petitioner alludes to the fact that the government obliterated a tape recording which allegedly demonstrated that petitioner had been promised leniency in return for his efforts as an informant. Petitioner makes no legal argument based on that claim, and the record clearly shows both that the tape was erased with petitioner's permission and that the government made no promises of leniency at the meeting in question (A. 864-868).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

DOCKET NO. 78-1429

ANTHONY COSTANZO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR PETITIONER

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CODE CITED:

United States Code, Title 5, §552a 1

STATEMENT

During the trial of this case the following demands for disclosure were made with the following results and prejudice.

A demand was made for Special Agent Jumonville's time records, which would have revealed the extent to which Jumonville devoted his time to the Petitioner's case, and the frequency and extent of Petitioner's cooperation (A272-273.290). They were neither produced nor accounted for.

A demand was made for the tapes which Petitioner provided to Jumonville, clearly relevant to the central issue in the case, whether Petitioner was providing information on Kelly continuously (A281-282, 513-514). Although Jumonville admitted receiving these tapes (A108), they were neither produced nor accounted for.

Investigative files which the Government conceded would contain information supplied by Petitioner (A778-779) were never produced.

Receipts for the tape supplied by Petitioner, which were supposed to be in the file which was maintained upon Petitioner as an informant and which would reflect to which investigative files the tapes were forwarded—and thus the extent and areas of Petitioner's cooperation—(A295) was neither produced nor accounted for.

When Petitioner was discovered taping his conversation with Jumonville and Peter Sarasohn, Assistant to the United States Attorney, the recording was obliterated by Jumonville at the suggestion of Sarasohn (A865). This process, however, produced a recording of the continuation of the meeting between Petitioner, Jumonville and

Sarasohn which Sarasohn then kept (A865-866). Although Jumonville had been able to listen to this tape before testifying as to that conversation (A269), the copy of this tape given to Petitioner could not be played on any machine (A241).

There was evidence that Patrick Kelly had provided Jumonville with three tapes of conversations relevant to the case. Apparently Jumonville did not recall receiving them (A106). They were never produced, and the trial court made no determination of whether there had been such tapes, what if anything became of them, nor take any other steps to determine whether Petitioner's rights under Brady or the Jencks Act had been violated.

Kelly, moreover, provided Jumonville with tapes concerning other investigations of alleged crimes in which he was involved (A214). When the issue of Kelly's relationship with Petitioner arose, Kelly testified that almost all the deals they had together were unlawful. Some of these allegations were discussed in detail as "other crime evidence" (A225-236). Petitioner denied that those other deals were unlawful (A548-559), except for those which he reported to the F.B.I. (A514). Tapes concerning these other "deals" were not produced. The informant's file maintained on Kelly, and the 302's prepared by Jumonville as a result of his conversations with Kelly were not produced.

ARGUMENT

This Court is not asked merely to grant appellate review of trial court fact finding on a new trial motion, even though the standard of review is involved. The Government's response does not squarely meet the issue. This is not merely a case where false evidence crept in. It is a major exposure of a Byzantine structure of the Government designed to control evidence so that informants/witnesses can be disciplined through the Judicial Branch and the activities of Government agents can be sanitized. The Court is asked to set ground rules on the preservation and disclosure of evidence in light of a clear, recent Congressional command so that the real trial takes place in a courtroom, not in the basement of the police station.

The false testimony was not merely of a witness. It was by an F.B.I. Special Agent, more particularly the Petitioner's "handler." It is the tip of the iceberg. The inaccurate April 5th report is part of the manipulated records structure designed to enforce discipline summarily and effectuate control through the courts.[1] Far from not making a legal claim (Gov't 7n.4) the Petitioner claimed at trial that the obliterated tape was made because he felt the government was not keeping its agreements, thus subjecting him unfairly to jeopardy and the tape was destroyed against his will. Former Assistant U.S. Attorney Sarasohn concedes that obliteration was his own idea and was carried out by Special Agent Jumonville (A865). If the tape was prejudicial to Petitioner, why destroy it

1. Records in an F.B.I. informant's file are, according to Government witnesses, used by F.B.I. agents to evaluate an informant's performance (A294-295). They are also used by the Government's attorneys in determining what dispositions of an informant/defendant's case to recommend (A1024-1025).

rather than use it as additional leverage to revive Petitioner's flagging cooperation or present it in Court as other tapes were presented? Why suppress evidence of a crime? On the other hand if, as Petitioner testified, the tape would have revealed bad faith on the Government's part, its destruction materially deprived Petitioner of a fair trial. Either way, the tape was valuable.

This brings up the Jencks Act. There is no doctrine of the white heart and the empty head. The Government regards the Jencks Act as a flag of convenience, and this Court must decide whether the Jencks Act is to be so emasculated.

In *United States v. Caceres*, No. 76-1309 (April 2, 1979) this Court re-affirmed the oft-repeated principle that agency regulations will be enforced to effectuate Congressional or Constitutional policies. The aim, always, is to favor the disclosure of relevant, probative evidence. In this corollary case to *Caceres*, are the required F.B.I. records flags of convenience or should they and the Freedom of Information Act completeness and record-keeping requirements[2] require that documentation

2. The Justice Department maintains a system of records on persons referred to in potential or actual cases and matters of concern to the General Crimes Section, Criminal Division, and correspondents on subjects directed or referred to the Criminal Division. See Justice/CRM-004, 42 F.R. 12765 (1977). It also maintains Justice/CRM-006, Information File on individuals and commercial entities known or suspected of being involved in fraudulent activities. 42 F.R. 12767 (1977). It also maintains Justice CRM-010 Organized Crime and Racketeering Information System. 42 F.R. 12769 (1977). There also exists Justice/CRM-022 Witness Immunity Records, which covers potential or actual witnesses for whom immunity is proposed. 42 F.R. 12778 (1977). The Federal Bureau of Investigation maintains an F.B.I. Central Records System, Justice/F.B.I.-002, which covers individuals who relate in any manner to offiicial F.B.I. investigations including, but not limited to suspects, victims, witnesses, and close relatives and associates that are relevant to an investigation. 42 F.R. 12809 (1977). Included within that system are such filing classifications as:

29. Bank Fraud and Embezzlement

be reliable rather than self-serving and should these standards be enforced by the Jencks Act, *United States v. Agurs*, 427 U.S. 97 (1976) and *Giglio v. United States*, 405 U.S. 150 (1972). This case is a lamentable catalog of information undisclosed after specific request. Contrary to the Government's position, *Agurs* is not limited to post trial discoveries. It also specifies perjury and demands for identified material, some of which was identified by the F.B.I. at trial but was never disclosed pursuant to demands.

The basic reason invoking this Court's jurisdiction remains: The relationship of Petitioner as a Government confidential informant is conceded and that relationship was continuing when the very crimes charged were supposed to have been committed.

Are existing judicial mechanisms adequate to ensure that information will be reliably kept and accurately disclosed? Is the remedy to be as the Government suggests, a naive assumption that the interaction between agents and their alter-ego cooperating captives can be judicially policed by new trial standards "generally" used for recanting witnesses? The suggestion brushes off the seriousness attached to misconduct by the Government underlying this Court's decision in *Giglio*. This is not a recanting witness "generally." It is a fundamental conflict between representatives of an enforcement agency and their operatives where the Government keeps the records and the

48. Postal Violations

87. Interstate Transportation of Stolen Property (Fraud by Wire, Radio, or Television)

137. Criminal Informants

166. Interstate Transportation in Aid of Racketeering.

183. Racketeer Influenced and Corrupt Organizations 42 F.R. 21668-21669 (1977)

courts are expected to mete out discipline at the Government's request.

With full awareness of the awesome power of information, Congress decided that record-keeping by Government agencies was not adequate to protect subjects of those dossiers. This case is confirmation of Congressional judgment. It is a case of Government adherence to the old ways and an opportunity for this Court to point to the new direction. This Court should grant certiorari and declare that Jencks Act disclosure should be at least as adequate as the requirement of record-keeping under the Freedom of Information Act and Agency regulations. Inadequate disclosure should be sanctioned as in *Giglio* and *Agurs*.

In the labyrinthine ways of the informant/cooperating witness system, new trial tests "generally" adequate should not suffice. Prejudice to the very ability to assert a defense is the only test that will with certainty ensure independence of the Judicial process.